

1-1 By: Duncan S.B. No. 361  
1-2 (In the Senate - Filed January 18, 2011; February 2, 2011,  
1-3 read first time and referred to Committee on State Affairs;  
1-4 March 8, 2011, reported favorably by the following vote: Yeas 8,  
1-5 Nays 1; March 8, 2011, sent to printer.)

1-6 A BILL TO BE ENTITLED  
1-7 AN ACT

1-8 relating to indemnification provisions in construction contracts.

1-9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

1-10 SECTION 1. Subsection (a), Section 130.002, Civil Practice  
1-11 and Remedies Code, is amended to read as follows:

1-12 (a) A covenant or promise in, in connection with, or  
1-13 collateral to a construction contract is void and unenforceable if  
1-14 the covenant or promise provides for a person [~~contractor~~] who is to  
1-15 perform the work that is the subject of the construction contract to  
1-16 indemnify or hold harmless a registered architect, licensed  
1-17 engineer or an agent, servant, or employee of a registered  
1-18 architect or licensed engineer from liability for damage that:

1-19 (1) is caused by or results from:

1-20 (A) defects in plans, designs, or specifications  
1-21 prepared, approved, or used by the architect or engineer; or

1-22 (B) negligence of the architect or engineer in  
1-23 the rendition or conduct of professional duties called for or  
1-24 arising out of the construction contract and the plans, designs, or  
1-25 specifications that are a part of the construction contract; and

1-26 (2) arises from:

1-27 (A) personal injury or death;

1-28 (B) property injury; or

1-29 (C) any other expense that arises from personal  
1-30 injury, death, or property injury.

1-31 SECTION 2. The Civil Practice and Remedies Code is amended  
1-32 by adding Title 10 to read as follows:

1-33 TITLE 10. ADDITIONAL MISCELLANEOUS PROVISIONS

1-34 CHAPTER 502. INDEMNITY PROVISIONS IN CONSTRUCTION CONTRACTS

1-35 Sec. 502.001. DEFINITIONS. In this chapter:

1-36 (1) "Claim" includes a loss or liability for a claim,  
1-37 damage, expense, or governmentally imposed fine, penalty,  
1-38 administrative action, or other action.

1-39 (2) "Construction contract" means a contract,  
1-40 subcontract, or agreement, or a performance bond assuring the  
1-41 performance of any of the foregoing, entered into or made by an  
1-42 owner, architect, engineer, contractor, construction manager,  
1-43 subcontractor, supplier, or material or equipment lessor for the  
1-44 design, construction, alteration, renovation, remodeling, repair,  
1-45 or maintenance of, or for the furnishing of material or equipment  
1-46 for, a building, structure, appurtenance, or other improvement to  
1-47 or on public or private real property, including moving,  
1-48 demolition, and excavation connected with the real property. The  
1-49 term includes an agreement to which an architect, engineer, or  
1-50 contractor and an owner's lender are parties regarding an  
1-51 assignment of the construction contract or other modifications  
1-52 thereto.

1-53 (3) "Indemnitor" means a party to a construction  
1-54 contract that is required to provide indemnification or additional  
1-55 insured status to another party to the construction contract or to a  
1-56 third party.

1-57 Sec. 502.002. PERMISSIBLE CONTRACT PROVISION. Parties may  
1-58 agree in a construction contract upon an indemnity or additional  
1-59 insured provision that is not prohibited by this chapter.

1-60 Sec. 502.003. AGREEMENT VOID AND UNENFORCEABLE. Except as  
1-61 provided by Section 502.004, a provision in a construction  
1-62 contract, or in an agreement collateral to or affecting a  
1-63 construction contract, is void and unenforceable as against public  
1-64 policy to the extent that it requires an indemnitor to indemnify,

2-1 hold harmless, or defend another party to the construction contract  
 2-2 or a third party against a claim caused by the negligence or fault,  
 2-3 the breach or violation of a statute, ordinance, governmental  
 2-4 regulation, standard, or rule, or the breach of contract of the  
 2-5 indemnitee, its agent or employee, or any third party under the  
 2-6 control or supervision of the indemnitee, other than the indemnitor  
 2-7 or its agent, employee, or subcontractor of any tier.

2-8 Sec. 502.004. EXCEPTION FOR EMPLOYEE CLAIM. Section  
 2-9 502.003 does not apply to a provision in a construction contract  
 2-10 that requires a person to indemnify, hold harmless, or defend  
 2-11 another party to the construction contract or a third party against  
 2-12 a claim for the bodily injury or death of an employee of the  
 2-13 indemnitor, its agent, or its subcontractor of any tier.

2-14 Sec. 502.005. UNENFORCEABLE ADDITIONAL INSURANCE  
 2-15 PROVISION. A provision in a construction contract that requires  
 2-16 the purchase of additional insured coverage, or any coverage  
 2-17 endorsement or provision within an insurance policy providing  
 2-18 additional insured coverage, is void and unenforceable to the  
 2-19 extent that it requires or provides coverage the scope of which is  
 2-20 prohibited under this chapter for an agreement to indemnify, hold  
 2-21 harmless, or defend.

2-22 Sec. 502.006. EXCLUSIONS. This chapter does not affect:

2-23 (1) an insurance policy, including a policy issued  
 2-24 under an owner-controlled or owner-sponsored consolidated  
 2-25 insurance program or a contractor-controlled or  
 2-26 contractor-sponsored consolidated insurance program, except as  
 2-27 provided by Section 502.005;

2-28 (2) a cause of action for breach of contract or  
 2-29 warranty that exists independently of an indemnity obligation;

2-30 (3) a provision in a construction contract that  
 2-31 requires the indemnitor to purchase or maintain insurance covering  
 2-32 the acts or omissions of the indemnitor;

2-33 (4) indemnity provisions contained in loan and  
 2-34 financing documents, other than construction contracts to which the  
 2-35 contractor and owner's lender are parties as provided under Section  
 2-36 502.001(2);

2-37 (5) general agreements of indemnity required by  
 2-38 sureties as a condition of execution of bonds for construction  
 2-39 contracts;

2-40 (6) the benefits and protections under the workers'  
 2-41 compensation laws of this state;

2-42 (7) the benefits or protections under the governmental  
 2-43 immunity laws of this state;

2-44 (8) agreements subject to Chapter 127; or

2-45 (9) a license agreement between a railroad company and  
 2-46 a person that permits the person to enter the railroad company's  
 2-47 property as an accommodation to the person for work under a  
 2-48 construction contract that does not primarily benefit the railroad  
 2-49 company.

2-50 Sec. 502.007. OTHER INSURANCE. This chapter does not  
 2-51 otherwise affect a construction contract provision that requires a  
 2-52 party to the contract to purchase:

2-53 (1) owners and contractors protective liability  
 2-54 insurance;

2-55 (2) railroad protective liability insurance;

2-56 (3) contractors all-risk insurance; or

2-57 (4) builders all-risk or named perils property  
 2-58 insurance.

2-59 Sec. 502.008. PROHIBITION OF WAIVER. The provisions of  
 2-60 this chapter may not be waived by contract or otherwise. Any  
 2-61 purported waiver is void and unenforceable.

2-62 Sec. 502.009. APPLICABILITY OF TEXAS LAW. Under this  
 2-63 chapter, the law of this state, exclusive of this state's  
 2-64 choice-of-law rules that would apply the laws of another  
 2-65 jurisdiction, shall apply to every construction contract agreement  
 2-66 affecting improvements to real property within this state.

2-67 SECTION 3. Section 2252.902, Government Code, is repealed.

2-68 SECTION 4. The changes in law made by this Act apply only to  
 2-69 an original construction contract with an owner of an improvement

3-1 or contemplated improvement that is entered into on or after the  
3-2 effective date of this Act. If an original construction contract  
3-3 with an owner of an improvement or contemplated improvement is  
3-4 entered into on or after the effective date of this Act, the changes  
3-5 in law made by this Act apply to a related subcontract, purchase  
3-6 order contract, personal property lease agreement, and insurance  
3-7 policy. If an original construction contract with an owner of an  
3-8 improvement or contemplated improvement is entered into before the  
3-9 effective date of this Act, that original construction contract and  
3-10 a related subcontract, purchase order contract, personal property  
3-11 lease agreement, and insurance policy are governed by the law in  
3-12 effect immediately before the effective date of this Act, and that  
3-13 law is continued in effect for that purpose.

3-14 SECTION 5. This Act takes effect September 1, 2011.

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